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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE

11 APPLIED FILTER TECHNOLOGY,
12 INC.,

13 Plaintiff,

14 v.

15 JEFF WETZEL, et al.,

16 Defendants.

CASE NO. C09-1040JLR

FINDINGS OF FACT,
CONCLUSIONS OF LAW, &
ORDER DENYING MOTION
FOR TEMPORARY
RESTRAINING ORDER

17 **I. INTRODUCTION**

18 This matter comes before the court on Plaintiff Applied Filter Technology, Inc.’s
19 (“AFT”) motion for temporary restraining order (Dkt. # 3). AFT requests that the court
20 order injunctive relief pursuant to Federal Rule of Civil Procedure 65(b) against
21 Defendants Jeff Wetzel and Environmental Systems and Composites, Inc. (“ESC”). The
22 court concludes that oral argument is unnecessary.¹ Having considered the motion, as
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25 _____
26 ¹ It is within the court’s discretion to deny a motion for temporary restraining order
without an evidentiary hearing. *Cf. Anderson v. Jackson*, 556 F.3d 351, 361 (5th Cir. 2009);

1 well as all papers filed in support and opposition and the balance of the record, the court
2 DENIES the motion for the reasons discussed below. The court schedules AFT's
3 motion for preliminary injunction (Dkt. # 2) for consideration on August 28, 2009.
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5 **II. BACKGROUND AND FINDINGS OF FACT**

6 **1.** AFT is a Washington corporation engaged in the business of providing products,
7 systems, and support to local utility companies and other entities to purify biogas.
8 (Declaration of Paul Tower ("Tower Decl.") (Dkt. # 5) ¶¶ 1-2.) AFT has developed
9 allegedly unique and proprietary technology for the removal of siloxane from fuel
10 gases. (Tower Decl. ¶ 4.) AFT has also developed allegedly unique and proprietary
11 methods and techniques for analyzing biogas. (Tower Decl. ¶ 5.)
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13 **2.** ESC is a Washington corporation operating in the biogas purification field.
14 (Declaration of Lowell Howard ("Howard Decl.") (Dkt. # 15) ¶¶ 2-4.) In 2007, ESC
15 became a competitor of AFT when it entered the biogas purification segment of the
16 filtration market. (Tower Decl. ¶¶ 3, 12.)
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18 **3.** Mr. Wetzel is a former consultant for AFT. (Declaration of Jeffrey Wetzel
19 ("Wetzel Decl.") (Dkt. # 14) ¶¶ 5-6; Tower Decl. ¶ 3.) In 1996, Mr. Wetzel began
20 working for AFT as a consultant on a part-time basis. (Tower Decl. ¶ 3.) He
21 terminated his contract with AFT in early June 2009. (Wetzel Decl. ¶ 15; Tower Decl.
22 ¶ 15.)
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25 *Nat'l Propane Gas Ass'n v. U.S. Dep't of Homeland Sec.*, 534 F. Supp. 2d 16, 19 (D.D.C. 2008);
26 *Rottman v. Penn. Interscholastic Athletic Ass'n, Inc.*, 349 F. Supp. 2d 922, 928 (W.D. Pa. 2004).

1 4. In 2003, Mr. Wetzel signed a confidentiality and non-disclosure agreement
2 (“Agreement”) with AFT. (Tower Decl. ¶ 3 & Ex. A (Agreement); Wetzel Decl. ¶ 7.)
3 The Agreement states that Mr. Wetzel shall not disclose confidential information
4 provided to him by AFT and shall return confidential information upon AFT’s request.
5 (Tower Decl., Ex. A ¶¶ 3-4, 6.)
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7 5. Mr. Wetzel performed work for AFT on his computer at home on occasion.
8 (Wetzel Decl. ¶ 9.)
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10 6. In 2007, Paul Tower, the owner of AFT, began to suspect that Mr. Wetzel was
11 providing ESC with confidential information from AFT so as to allow ESC to compete
12 in the biogas purification market. (Tower Decl. ¶ 13.) AFT hired legal counsel to
13 determine whether Mr. Wetzel was providing confidential information to ESC. (Tower
14 Decl. ¶ 13.) However, “AFT was unable to substantiate its suspicions about Wetzel and
15 ESC.” (Tower Decl. ¶ 13.)
16

17 7. After Mr. Wetzel terminated his relationship with AFT, Mr. Tower requested that
18 Mr. Wetzel return confidential information that he had downloaded from AFT’s
19 computer systems to portable hard drive storage devices that he owned for the purpose
20 of working on AFT business at home. (Tower Decl. ¶ 15.) Mr. Tower states that Mr.
21 Wetzel did not comply with his request, nor with a subsequent request from Mr.
22 Tower’s counsel. (Tower Decl. ¶ 15.) Mr. Wetzel states that he “deleted all the
23 material in the AFT files on [his] storage device” and “took hard copies of AFT
24 documents going back to 2003 to a commercial shredding facility.” (Wetzel Decl. ¶
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1 13.) Mr. Wetzel further states that he has “retained no AFT proprietary and confidential
2 information” and that his attorney communicated this information to Mr. Tower.

3 (Wetzel Decl. ¶ 13.)
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5 **8.** Mr. Tower states that he has been informed that “Wetzel, on behalf of ESC, and
6 ESC and its agents, have represented to customers and potential customers of AFT and
7 ESC that ESC’s technology relating to biogas purification is ‘the same’ as AFT’s, that
8 ESC ‘has’ AFT’s technology, that ESC ‘split off’ from AFT and possesses the same
9 technology, and that ESC ‘stole’ Wetzel and his know-how away from AFT.” (Tower
10 Decl. ¶ 16.)
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12 **9.** ESC has competed for or is competing for two projects—one in Richmond,
13 California (“Richmond Project”), and one at “Ina Road” in Tucson, Arizona (“Ina Road
14 Project”)—that AFT alleges were not publicly known, but were known to Mr. Wetzel
15 allegedly through his access to confidential information from AFT. (Tower Decl. ¶ 16.)
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17 **10.** The Richmond project went to bid on July 21, 2009, and the Ina Road project will
18 go to bid at the end of August 2009.² (Tower Decl. ¶ 19; Supplemental Declaration of
19 Paul Tower (“Supp. Tower Decl.”) (Dkt. # 11) ¶ 2.)
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21 **11.** Mr. Howard states that ESC “has a representative organization, MISCO, that is
22 active throughout the United States, which contacts ESC to inform it of projects up for
23 bid and charges a commission for any such projects ESC then obtains.” (Howard Decl.
24

25 ² At the time AFT filed its motion for temporary restraining order, it believed the Ina
26 Road Project would go to bid at the end of July 2009. (See Tower Decl. ¶ 19.)

1 ¶ 5.) He states that MISCO notified ESC of the Richmond and Ina Road Projects.

2 (Howard Decl. ¶ 5.)

3
4 **12.** Mr. Tower states that Mr. Wetzel “contacted a supplier to AFT who makes a
5 proprietary chemical compound used exclusively, under license, by AFT in one of its
6 unique, proprietary filtration processes.” (Tower Decl. ¶ 17.) “Wetzel made inquiries
7 about obtaining the supplier’s proprietary chemical compound and information about
8 how to use the chemical (including pressurization information) indicating that the
9 process he intended to use the chemical in is AFT’s proprietary filtration process.”
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11 (Tower Decl. ¶ 17.)

12 **13.** Mr. Wetzel agrees that he telephoned this supplier, but states that he located the
13 supplier via an internet search. (Wetzel Decl. ¶ 17.)

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15 **14.** Mr. Tower also states that Mr. Howard telephoned an employee of Activated
16 Carbon, a processing and packaging contractor for AFT, to inquire about pricing on
17 container qualities of a silica gel. (Second Supplemental Declaration of Paul Tower
18 (“Sec. Supp. Tower Decl.”) (Dkt. # 17) ¶¶ 2-3.) Mr. Tower states that Mr. Howard
19 provided the “exact specifications of the silica gel that he was interested in” and states
20 that “those specifications matched exactly to the specifications for AFT’s proprietary
21 silica gel product.”³ (Sec. Supp. Tower Decl. ¶ 3.)
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25 ³ AFT provided this evidence for the first time attached to its reply. Mr. Wetzel and ESC
26 have not had an opportunity to respond specifically to this evidence. On August 5, 2009,
however, they filed a surreply (Dkt. # 20) requesting that the court strike the new allegations
raised for the first time in Mr. Tower’s second supplemental declaration, as well as any portions

1 **15.** On July 22, 2009, AFT filed its complaint against Mr. Wetzel and ESC. (*See*
2 Dkt. # 1.) AFT alleges claims for breach of contract, tortious interference with
3 contractual relations, violation of Washington’s Uniform Trade Secrets Act (“UTSA”),
4 RCW § 19.108 et seq., and violation of the Computer Fraud and Abuse Act, 18 U.S.C. §
5 1030 et seq. (Compl. (Dkt. # 1) ¶¶ 36-69.)

7 **16.** On July 24, 2009, AFT filed the instant motion for temporary restraining order
8 and a motion for preliminary injunction. (*See* Dkt. # 3.) In its motion for temporary
9 restraining order, AFT incorporates by reference the arguments made in its motion for
10 preliminary injunction. (Mot. for TRO (Dkt. # 3) at 2 (incorporating Mot. (Dkt. # 3)).)

12 **17.** On July 24, 2009, AFT gave notice and sent copies of the motions, the complaint,
13 and other documents filed in this matter to Mr. Wetzel and ESC. (*See* Dkt. # 7.) Mr.
14 Wetzel and ESC have appeared by counsel in this matter and responded to the motion
15 for temporary restraining order. (*See* Dkt. # 12.)

17 **III. ANALYSIS AND CONCLUSIONS OF LAW**

18 **18.** The court has jurisdiction over this case pursuant to 28 U.S.C. § 1331 because
19 AFT alleges federal claims against ESC and Mr. Wetzel under the Computer Fraud and
20 Abuse Act, 18 U.S.C. § 1030 *et seq.* The court has supplemental jurisdiction over the
21 remaining state law claims pursuant to 28 U.S.C. § 1367.
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25 of AFT’s reply that rest on such new allegations. The court concludes that Mr. Wetzel and
26 ESC’s request to strike is moot because the new allegations do not alter the court’s analysis, as
discussed below.

1 **19.** AFT seeks a temporary restraining order to enjoin ESC and Mr. Wetzel from (1)
2 competing with AFT for work related to the Ina Road project; (2) using AFT's
3 proprietary and confidential information relating to customers and suppliers for the
4 purpose of competing with AFT in obtaining work on future projects on which AFT is
5 attempting to procure work; (3) using AFT's proprietary and confidential information
6 relating to testing, product design, processes, designs, and techniques in advertisements,
7 solicitations, discussions, or proposals to potential customers, suppliers, employees,
8 agents, or the public; and (4) accessing, destroying, altering, or copying, any
9 electronically stored information contained within ESC or Wetzel's computer systems,
10 including file servers, email servers, webmail repositories, "cloud" storage, or home or
11 personal systems, pending AFT's forensic expert copying such information. (Mot. for
12 TRO at 1; Proposed Order (Dkt. # 3-2) at 3.) In addition, AFT requests that the court
13 order ESC and Mr. Wetzel to permit its forensic expert to have access to and make
14 copies of all portable and non-portable media containing ESC's and Mr. Wetzel's
15 electronically stored information.
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17 **20.** In order to obtain a temporary restraining order, AFT must meet the standard for
18 issuing a preliminary injunction. *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co., Inc.*
19 240 F.3d 832, 839 n.7 (9th Cir. 2001) (noting that preliminary injunction and temporary
20 restraining order standards are "substantially identical"). A preliminary injunction is an
21 "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff
22 is entitled to such relief." *Winter v. Natural Res. Def. Council*, ___ U.S. ___, 129 S.Ct.
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365, 375-76 (2008). A plaintiff seeking a preliminary injunction must establish (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest. *Winter*, 129 S.Ct. at 374; *Am. Trucking Assoc., Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

21. Likelihood of Success on the Merits: Breach of Contract Claim.

- a. AFT argues that it has demonstrated a likelihood of success on the merits of its breach of contract claim because (1) Mr. Wetzel has not returned information downloaded to personal hard drives; and (2) Mr. Wetzel has contacted a chemical supplier of AFT. (Mot. at 7.) In response, Mr. Wetzel states that at the time he ended his relationship with AFT he “deleted all the material in the AFT files on [his] data storage device” and “took hard copies of AFT documents going back to 2003 to a commercial shredding facility.” (Wetzel Decl. ¶ 13.) Mr. Wetzel declares that, to his knowledge, he has retained no AFT proprietary or confidential information and that his attorney communicated this fact to Mr. Tower. (*Id.*) Mr. Wetzel further states that he identified the chemical supplier via an internet search, albeit with the knowledge that AFT had worked with the supplier. (Wetzel Decl. ¶ 17.) He states that he had not previously worked with the supplier and had no knowledge of an exclusive agreement between AFT and the supplier. (*Id.*)

- 1 b. On the present record, the court concludes that AFT has not demonstrated a
2 likelihood of success on the merits of its breach of contract claim. Mr. Wetzel
3 does not challenge the validity of the Agreement, and the court will assume its
4 validity for present purposes. The court is also mindful that Mr. Wetzel agrees he
5 obtained confidential information from AFT while working as a consultant.
6 Nonetheless, Mr. Wetzel declares that he destroyed all of the confidential
7 information he obtained from AFT. (Wetzel Decl. ¶ 13.) Although the
8 Agreement provides that Mr. Wetzel must “return,” as opposed to destroy,
9 confidential information upon AFT’s request (Compl., Ex. A ¶ 5), AFT has not
10 indicated that it made such a request prior to the time Mr. Wetzel destroyed the
11 information.
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15 c. AFT’s evidence in support of its allegation that Mr. Wetzel and ESC have
16 possession of AFT’s confidential information is meager and strongly disputed.
17 Mr. Tower admits that AFT was previously “unable to substantiate its suspicions
18 about Wetzel and ESC” (Tower Decl. ¶ 13), and it is not clear that AFT has
19 discovered new, more probative evidence at this time. In his declaration, Mr.
20 Tower alleges that the manner in which ESC competed for projects indicated to
21 him that ESC was using AFT’s confidential information due to the fact that these
22 projects “were not public knowledge,” but were known to AFT. (Tower Decl. ¶
23 14.) Mr. Tower thus infers that ESC must have confidential information because
24 it is competing for the Richmond and the Ina Road Projects, among others. (*See*
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1 Tower Decl. ¶ 16.) This inference, however, falters in the face of Mr. Howard's
2 explanation that ESC learned of these two projects from its "representative
3 organization, MISCO, that is active throughout the United States, which contacts
4 ESC to inform it of projects up for bid and charges a commission for any such
5 projects ESC then obtains." (Howard Decl. ¶ 5.) AFT does not attempt to rebut
6 this evidence in its reply. The court finds that the fact that ESC is competing for
7 the Richmond and Ina Road Projects does not demonstrate a likelihood of success
8 on AFT's breach of contract claim.
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- 11 d. Likewise, AFT contends that Mr. Wetzel and ESC have possession of AFT's
12 confidential information based on comments made by third-parties. Mr. Tower
13 states that third-parties have told him that Mr. Wetzel and ESC have represented
14 that they "are in possession of, own, or have access to AFT's proprietary and
15 confidential information." (Sec. Supp. Tower Decl. ¶ 7; *see* Sec. Supp. Tower
16 Decl. ¶ 6.) AFT correctly notes that evidence that otherwise might be
17 inadmissible at trial may be considered on a motion for temporary restraining
18 order in light of the expedited nature of such proceedings. *See Johnson v.*
19 *Couturier*, __ F.3d __, Nos. 08-17369, 08-17373, 08-17375, 08-17631, 2009 WL
20 2216805, at *11 (9th Cir. July 27, 2009). Despite this leniency, however, a court
21 need not and should not overlook the reliability of this evidence when weighing it
22 against other evidence. Here, Mr. Wetzel declares that he has "not represented to
23 anyone that ESC's biogas purification technology is 'the same' as AFT's
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1 technology, that ESC ‘has’ AFT’s technology, that ESC ‘split off’ from AFT and
2 possesses the same technology, or that ESC ‘stole’ me away from AFT,” and that
3 he is “unaware of anyone else making any such representations.” (Wetzel Decl. ¶
4 15.) Similarly, Mr. Howard disclaims making any of these statements or having
5 knowledge of anyone else making such statements. (Howard Decl. ¶ 8.) AFT
6 asks the court to disregard this evidence in favor of Mr. Tower’s representations
7 that he has been told by third-parties that Mr. Wetzel has made these types of
8 statements. (Tower Decl. ¶ 16; Sec. Supp. Tower Decl. ¶ 6.) The court declines
9 to do so. Instead, the court finds that the weight properly afforded to AFT’s
10 evidence on this issue is substantially reduced by the less reliable character of the
11 evidence, and that Mr. Wetzel and ESC’s evidence clearly outweighs AFT’s
12 evidence. Further, even were the court to accept Mr. Tower’s characterizations of
13 third-party statements at face value, these statements do not shed real light on the
14 alleged conversations between Mr. Wetzel and third-parties. The court
15 acknowledges the difficulties facing AFT in gathering probative evidence on this
16 issue under time constraints. Nevertheless, the burden rests with AFT, not with
17 Mr. Wetzel or ESC, to justify the extraordinary remedy AFT seeks. The court
18 concludes that AFT has not shown a likelihood of success on the merits of its
19 breach of contract claim based on third-party comments.

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25 e. Finally, AFT argues that the fact that Mr. Wetzel and Mr. Howard have
26 telephoned certain of AFT’s suppliers demonstrates that Mr. Wetzel and ESC

1 possess its confidential information. (Tower Decl. ¶ 17; Supp. Tower Decl. ¶ 3;
2 Sec. Supp. Tower Decl. ¶ 3.) Mr. Tower's statements regarding conversations
3 between third-party suppliers and Mr. Wetzel and Mr. Howard are hearsay. In
4 response, Mr. Wetzel declares that he identified the chemical supplier he spoke
5 with in June 2009 and July 2009 via an internet search and that he did not state to
6 the supplier that he intended to use AFT's proprietary filtration process. (Wetzel
7 Decl. ¶ 17.) Although Mr. Howard has not specifically addressed Mr. Tower's
8 contentions regarding Mr. Howard's alleged conversation with an employee of
9 Activated Carbon due to the fact that AFT submitted this evidence for the first
10 time in reply, Mr. Howard has stated that "ESC does not possess any AFT
11 confidential information." (Howard Decl. ¶ 5.) The court finds that AFT's
12 evidence carries little weight and that, in light of Mr. Wetzel and ESC's
13 countervailing evidence, AFT has not demonstrated a likelihood of success on the
14 merits of its breach of contract claim based on conversations between Mr. Wetzel
15 and Mr. Howard and third-parties.

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20 f. On balance, taking the evidence as a whole, the court finds that AFT has not met
21 its burden in demonstrating a likelihood of success on its breach of contract
22 claim. On the present record, AFT has demonstrated a possibility of success on
23 the merits, but it has not shown a likelihood. In particular, AFT has not shown a
24 likelihood of success in establishing that Mr. Wetzel and ESC have possession of
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1 and are using AFT's confidential information, which would give rise to a breach
2 of the Agreement.

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4 **22. Likelihood of Success on the Merits: UTSA Claims.**

- 5 a. AFT's UTSA claims against Mr. Wetzel and ESC are predicated on essentially
6 the same evidence submitted in support of its breach of contract claim. As
7 discussed above, the court finds that AFT has not shown a likelihood of success
8 in demonstrating that Mr. Wetzel and ESC have possession of and are using
9 AFT's confidential information. This finding similarly undercuts AFT's UTSA
10 claims.
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- 12 b. To prevail on a claim for misappropriation of a trade secret under Washington
13 law, the plaintiff must establish that the information (1) derives independent
14 economic value from not being generally known or readily ascertainable and (2)
15 is the subject of efforts that are reasonable under the circumstances to maintain its
16 secrecy. *See* RCW § 19.108.010(4). In its motion, AFT argues that Mr. Wetzel
17 and ESC have misappropriated its customer and supplier information and its
18 proprietary processes. (Mot. at 8.)
19
- 20 c. AFT has not demonstrated a likelihood of success on the merits of its UTSA
21 claims with respect to its customer and supplier lists. "Trade secret protection
22 will not generally attach to customer lists where the information is readily
23 ascertainable. If information is readily ascertainable from public sources such as
24 trade directories or phone books, then customer lists will not be considered a
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1 trade secret and a prior employee, not subject to a noncompetition agreement,
2 would be free to solicit business after leaving employment.” *Ed Nowogroski Ins.,*
3 *Inc. v. Rucker*, 971 P.2d 936, 944 (Wash. 1999) (citations omitted). Here, ESC
4 states that it learned of the Richmond and Ina Road Projects from MISCO
5 (Howard Decl. ¶ 5), and Mr. Wetzel declares that he identified chemical suppliers
6 based on internet searches (Wetzel Decl. ¶ 17). AFT has not replied to this
7 evidence. On the present record, the information contained in customer and
8 supplier lists identified by AFT as proprietary appears to be “readily
9 ascertainable” through other sources. Accordingly, the court finds that AFT has
10 not met its burden in demonstrating a likelihood of success on the merits of its
11 UTSA claims involving its customer and supplier lists.

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15 d. AFT has also not demonstrated a likelihood of success on the merits of its UTSA
16 claims with respect to its proprietary processes. AFT’s processes may well be of
17 the type entitled to protection as trade secrets under the UTSA. However, AFT
18 has not identified specific processes at issue in its motion. While the court is
19 mindful that providing too much specification might reveal the very secrets which
20 form the basis of AFT’s claims, generalized allusions to unidentified processes
21 offer the court no method to evaluate the merits of AFT’s UTSA claims, nor
22 whether Mr. Wetzel or ESC have misappropriated the processes. The court finds
23 that AFT has not shown a likelihood of success on the merits of its UTSA claims
24 involving proprietary processes.
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1 e. On balance, taking the evidence as a whole, the court finds that AFT has not met
2 its burden in demonstrating a likelihood of success on the merits of its UTSA
3 claims.
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5 **23. Likelihood of Irreparable Harm**

6 a. AFT argues that it will suffer irreparable harm if the court does not issue a
7 temporary injunction to enjoin Mr. Wetzel and ESC. (Mot. at 9-10.)
8 Specifically, AFT argues that it has demonstrated a likelihood of irreparable harm
9 because (1) “AFT will suffer additional lost profits from projects that are awarded
10 to ESC because ESC’s ‘free riding’ on AFT’s investment allows it to under-bid
11 AFT” and (2) “AFT will experience a loss of goodwill within the small industry
12 in which it competes,” with respect to customers, suppliers, and strategic partners.
13 (Mot. at 9-10.) It contends that Mr. Wetzel and ESC are “brazenly flouting their
14 misappropriation of AFT’s processes and information.” (Mot. at 10.)
15 Additionally, AFT argues that it may be harmed if Mr. Wetzel and ESC
16 incorporate AFT confidential information into products or processes or transfer it
17 to others. (Mot. at 10.) In response, Mr. Wetzel and ESC contend that AFT has
18 not shown a likelihood of irreparable harm because any lost profits may be
19 compensated by an award of monetary damages, if necessary, and the evidence
20 does not support the conclusion that either Mr. Wetzel or ESC have possession of
21 confidential information or are flouting their possession of such information.
22 (Resp. at 9-10.)
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1 b. AFT has not demonstrated a likelihood of irreparable harm based on lost profits.

2 Ordinarily, lost profits do not rise to the level of irreparable harm because they
3 can be compensated by an award of monetary damages. *See Los Angeles*
4 *Memorial Coliseum Commission v. Nat'l Football League*, 634 F.2d 1197, 1202
5 (9th Cir. 1980). To the extent AFT seeks lost profits potentially flowing from the
6 Richmond Project or the Ina Road Project, AFT has not shown it could not
7 reasonably calculate lost profits. However, even assuming that AFT's potential
8 lost profits could not be reasonably calculated with respect to other projects, AFT
9 has not identified particular projects that it believes ESC will be awarded over
10 AFT's competing bid. While AFT alludes to "opportunities that it would not
11 know even existed," potential lost profits from these opportunities are extremely
12 speculative and AFT has provided no evidence suggesting that it will suffer such
13 harm before the court can rule on a motion for preliminary injunction. The court
14 finds that AFT has not met its burden in demonstrating a likelihood of irreparable
15 harm based on lost profits.

16 c. AFT has also not demonstrated a likelihood of irreparable harm based on a loss of
17 goodwill. Intangible benefits such as business goodwill and reputation are often
18 not quantifiable, and their loss may amount to irreparable harm. *See Rent-A-*
19 *Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603
20 (9th Cir. 1991) ("[I]ntangible injuries, such as damage to . . . goodwill, qualify as
21 irreparable harm."); *see also United Healthcare Ins. Co. v. AdvancePCS*, 316

1 F.3d 737, 741 (8th Cir. 2002) (“Loss of intangible assets such as reputation and
2 goodwill can constitute irreparable injury.”); *MySpace, Inc. v. Wallace*, 498 F.
3 Supp. 2d 1293, 1305 (C.D. Cal. 2007) (“Harm to business goodwill and
4 reputation is unquantifiable and considered irreparable.”). AFT argues that it will
5 suffer a loss of goodwill based on Mr. Wetzel and ESC “brazenly flouting” their
6 alleged misappropriation of AFT processes and information. As discussed above,
7 the court is not persuaded that AFT, on the present record, has shown a likelihood
8 of establishing that either Mr. Wetzel or ESC possess AFT’s confidential
9 information or that they are representing having possession of such information.
10 AFT’s present contention that it will suffer a loss of goodwill is thus highly
11 speculative. The court finds that AFT has not demonstrated a likelihood of
12 irreparable harm based on a loss of goodwill.

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16 d. AFT has not demonstrated a likelihood of irreparable harm based on Mr. Wetzel
17 or ESC using AFT’s confidential information. AFT’s argument that Mr. Wetzel
18 and ESC may incorporate AFT’s confidential information into other products or
19 processes is too speculative.
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21 e. On balance, taking the evidence as a whole, the court finds that AFT has not
22 satisfied its burden in demonstrating a likelihood of irreparable harm.
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24 **24. Balance of Equities**

- 25 a. The balance of equities does not favor AFT. The injunctive relief requested by
26 AFT would prevent ESC from competing for the Ina Road Project, as well as

1 other projects. To the extent that ESC is barred from such projects it may suffer
2 the types of harm alleged by AFT, *i.e.*, lost profits and loss of goodwill. AFT
3 contends that its alleged status as “the dominant company in the biogas
4 purification industry” entitles it to greater deference in light of its accumulated
5 goodwill. (Mot. at 10.) Conversely, a less-established company attempting to
6 break into a new market, as AFT describes ESC, may have little margin for
7 setback and thus feel the brunt of injunctive relief with particular acuity. Absent
8 a further showing that Mr. Wetzel and ESC have possession of AFT’s
9 confidential information and are using it to compete with AFT, the court finds
10 that AFT has not demonstrated that the balance of equities tips in its favor.
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13 **25. Public Interest**

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15 a. The public interest is not meaningfully implicated by the dispute between AFT
16 and Mr. Wetzel and ESC. To the limited extent that the public interest is
17 implicated, however, it favors more rather than less competition with respect to
18 local utility projects.
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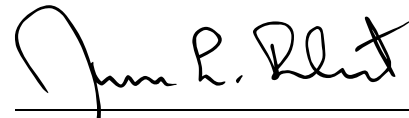
20 **26.** In sum, the court concludes that AFT has not met its burden for issuance of a
21 temporary restraining order under the standard articulated by the Supreme Court in
22 *Winter*. The court therefore denies AFT’s motion for temporary restraining order.
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IV. CONCLUSION

For the forgoing reasons, the court DENIES the motion for temporary restraining order (Dkt. # 3). The court sets AFT's motion for preliminary injunction (Dkt. # 2) for consideration on August 28, 2009. AFT shall file any additional briefing or evidence in support of its motion for preliminary injunction by August 14, 2009. Mr. Wetzel and ESC shall file any additional briefing or evidence in response by August 24, 2009. AFT shall file any additional reply by August 27, 2009.

Dated this 5th day of August, 2009.



JAMES L. ROBART
United States District Judge